SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 792

SALLIE ESSARY, Executrix of the Estate of William H. Essary, Deceased,

Petitioner,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a Corporation; and J. M. KURN and JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a Corporation.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of the Court Below.

The opinion of the Supreme Court of Oklahoma in *Sallie Essary, Executrix of the Estate of William H. Essary, Deceased, Plaintiff in Error,* v. *Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a corporation; and J. M. Kurn and John G. Lonsdale, Trus-*

tees of the Estate of St. Louis-San Francisco Railway Company, a Corporation, Defendants in Error, is not yet officially reported but was rendered June 10, 1941, and appears at 116 Pac. (2d) 712, and Record 207-212. Petition for rehearing was filed July 8, 1941 (R. 212) and denied September 9, 1941 (R. 212).

Statutory Provisions Sustaining the Jurisdiction.

The jurisdiction of this Court is based upon the Judicial Code, Sec. 237, as amended by the Act of February 13, 1925, Chapter 229, Sec. 1, 43 Stat. 937 (U. S. Code, Title 28, Sec. 344) (Sec. 344(b)) which provides in part as follows:

> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment has been rendered by the highest court of a state in which * * * any title, right, privilege or immunity is specifically set up or claimed under any statute of * * * the United States."

Substantiality of the Questions Involved.

Inasmuch as this case involves the questions of the sufficiency of the evidence to sustain a verdict for petitioner and the denial to petitioner of the benefits of the Safety Appliance and Federal Employers' Liability Acts, petitioner believes that substantial Federal questions are involved reviewable upon a writ of certiorari. *New York Central R. Co.* v. *Winfield,* 37 S. Ct. 546-7, 244 U. S. 147-9, 61 L. Ed. 1045-7; *C. G. W. R. Co.* v. *Basham,* 249 U. S. 146, 39 S. Ct. 213, 63 L. Ed. 534; *Zucht* v. *King, et al.,* 260 U. S. 174, 43 S. Ct. Rep. 24, 67 L. Ed. 189.

Statement of the Case.

Petitioner's decedent when killed was a member of a switching crew of respondents (R. 61, 184). The move-

ment being made at the time of decedent's death was on the main Frisco track (R. 31, 62-63, 184). The track thereat extends northeast and southwest (R. 127). There is a switch track for the Clinton Compress which connects with the Frisco main track 1186 feet south of the south edge of the Compress, at which point there is a switch stand (R. 127) where the grade of the track was 1.02 per cent (R. 127), which grade prevailed for 275 feet south of the switch stand (R. 129) and for about 400 or 500 feet north of the switch stand (R. 129). Decedent was killed about 3:30 or 4:00 P. M. (R. 62, 161) November 9, 1937 (R. 172-173). It was raining (R. 62, 158) and decedent was wearing his boots and raincoat (R. 123) such as other railroad men wear (R. 160). There were four members in the switch crew being W. I. Snowden, engineer, Frank Fast, fireman, Evan E. Morgan, switch foreman, and decedent (R. 61).

The engine was headed south and had backed ten loaded cars from Clinton to be placed on the Compress switch track (R. 62, 173). There were four empty Rock Island box cars on this track which had to be moved to make room for the ten cars and the ten cars were coupled to the four empties, all of which were pulled out on the main line and stopped at a point where the last car was about 15 feet south of the switch stand, where Morgan arranged with decedent to stop the four cars they were going to shunt down the main line (R. 62, 166), which it was decedent's duty to do (R. 75, 87-88), while Morgan walked along the west side of the drag about three car lengths where he gave a signal to the engineer to back up, which he did (R. 63), moving back north (R. 167) at a speed of two or three miles per hour (R. 161, 179). When Morgan was opposite the place where the cut was to be made he grabbed the pin lifter, gave the engineer a stop signal and attempted to uncouple the cars (R. 63-64, 74), which is the proper method of uncoupling as the engineer can't stop as quickly

as the switchman can give the signal and pull the pin (R. 75, 96, 107, 109-110) but he could not operate the coupler (R. 63-64, 65) although he tried to do so two or three times (R. 66). He put pressure enough upon it to operate it under ordinary circumstances (R. 65). There was no reason why the coupler should not have worked unless the engineer had previously applied the brake (R. 63-64) without a signal, which was not customary (R. 63-65) and which was not done (R. 73, 179).

Morgan then got up on the car (Ex. 6, R. 70-A), put his weight with his foot on the lever, gave the engineer a signal for some slack (R. 63, 73, 167, 170) and thereupon made the cut.

When the train pulled out of the Compress track they stopped until Morgan gave the engineer a back-up signal when he throwed the engine in reverse (R. 174). At that first stop the cars were banked against the engine (R. 176). When they received the back-up signal the engine started rolling first and was shoving the cars down and the slack don't run out when the engine is rolling back until the brakes are applied, and the slack would not commence to run out in the cars until the engineer applied his brakes (R. 177, 180, 181). The slack starts at the engine and goes from the first to second, to third car, etc., back to the end of the train (R. 182).

While Morgan was walking toward the head end decedent went up the ladder on the east side to the brake wheel on top of the north end of the rear car (R. 31) and fell from it after it had just cleared the frog of the switch (R. 35) which was 81½ feet north of the switch stand (R. 128) according to witness Robinson, or approximately 120 feet north of the switch stand, according to witness Boone (R. 158), at which point his hat and club were found. His body was found 210 feet farther north (R. 158). His boots were off (R. 34) and laying near the body (R. 158). A piece

had been torn from his raincoat and was found hanging in the frog of the switch track (R. 86). Just before he fell he was at the brake (R. 31, 51). Witness Robinson did not notice the cars being disconnected until after the four cars had run over decedent (R. 33), but at the time decedent fell they were all in line with one another (R. 37).

Morgan put pressure enough upon the pin lifter to have operated it with his hand (R. 65) and he tried more than once to so operate it (R. 66). The coupler in question was the only one he had ever found it necessary to use his foot to operate in 44 years' experience (R. 60, 66-67) and he had found it necessary many times before to use his foot in operating the type of coupler in question (R. 66-67). The new types of cars they are building are not equipped with such type of coupler (R. 67).

If the engineer had shut off the engine prior to Morgan's attempt to pull the pin it would not necessarily have prevented him from pulling it but the engineer never stopped the engine prior to Morgan's attempt to pull the pin (R. 73). If the coupler had operated the first time he attempted to operate it the four cars would have rolled away from the train at the same speed at which they were moving when cut off and there would have been no jolt, jar or stop (R. 75, 88, 111-112). Morgan testified that at the time he uncoupled the car with his foot he could not have uncoupled it with his hand even though the engineer had given him slack (R. 76-78).

Morgan testified that the same grade extended from 1500 to 2000 feet north from the switch stand (R. 169) and that after he cut the cars off they rolled on down from 300 to 500 feet and stopped of their own accord (R. 171). He said 300 feet in his report to respondents (R. 163).

Fireman Fast testified the whole train was not hooked up with air when the engineer released the brakes and the engine naturally started back and backed from 2 to 4 car

lengths (R. 180) and the slack would run out when he applied his brakes (R. 181).

Engineer Snowden testified that after they pulled out on the main track he backed up about two car lengths and stopped upon a signal, after which he backed the engine about 6 feet (R. 173, 176), stopped, and the cut was made (R. 173).

The length of a box car is 40 feet (R. 112). The amount of slack between each car (R. 92) is 16 inches and from 7 to 12 feet in 14 cars (R. 83-95). The effect of slack running out in 14 cars would cause a jolt or jar sufficient to throw a man not expecting it off the top (R. 88) and the more cars the greater the jerk (R. 110).

Witness Harrell was acquainted with respondents' track at the point where decedent was killed (R. 95) and testified that if an engine coupled to these 14 cars after pulling out of the switch and starting back to the north and down grade, the slack would be bunched so that a pin could be pulled between any of the cars until the engine stopped again, which would cause the slack to run out and tighten the pins (R. 96). If the pin could not be pulled from one side the train should be stopped and an attempt made to operate the coupling from the other side (R. 97).

If the engineer merely released the brake the engine is so much heavier than the cars that it would roll faster than the cars and push them together, thereby bunching the slack so that there would be sufficient to permit the uncoupling of the cars (R. 98). The slack starts at the first car and runs out at the last car (R. 99).

Howard Dodd testified that when the slack is bunched and sufficient force is put on the pin lifter the cars can be uncoupled if the coupler is in operating condition (R. 106). The engineer can't stop as quickly as a brakeman can give the signal to stop and catch the pin (R. 107). The running out of the slack in 14 cars would be sufficient to jerk a man

off the top (R. 108). Morgan testified that the slack would not run out unless the brakes were applied (R. 65).

Specifications of Error.

1. The court erred in holding that the evidence was insufficient to support a verdict for petitioner under the Federal Employers' Liability and Safety Appliance Acts.

2. The court erred in deciding and holding as a matter of law that the evidence wholly failed to show that the coupler in question was inoperative and therefore defective.

3. The court erred in holding that there was no violation of the Federal Employers' Liability Act and that petitioner conceded there was no violation thereof.

4. The court erred in holding there was no evidence that the failure of the coupler to operate was the proximate cause of decedent falling from the car and that to so hold would result in building inference upon inference, and erroneously overlooked and failed to duly appreciate and give effect to all the evidence upon this point.

5. The court erred in holding that the instructions while conflicting and confusing sufficiently advised the jury of the principles of law to be applied to the facts in the case as found by them from the evidence.

Summary of the Argument.

I.

This Court is not bound by a finding of fact or a mixed finding of fact and law made by a State court when reviewing a State court decision denying a claimed Federal right.

Northern Ry. Co. v. *State of Washington,* 300 U. S. 154, 57 S. Ct. 397, 81 L. Ed. 573;

Norris v. *Alabama,* 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074;

Johnson Oil Co. v. *Oklahoma,* 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238;

Kansas City So. Railway Co. v. *C. H. Albers Comm. Co.,* 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316;

Cresswill v. *Grand Lodge K. of P. of Ga.,* 225 U. S. 246, 56 L. Ed. 1074, 32 S. Ct. 822;

C. M. & St. P. R. Co. v. *Coogan,* 271 U. S. 472, 474, 46 S. Ct. Rep. 564, l. c. 565, 70 L. Ed. 1041;

Gulf, M. & N. R. Co. v. *Wells,* 275 U. S. 455, 457, 48 S. Ct. 151, l. c. 152, 72 L. Ed. 370;

Western & Atlantic Ry. Co. v. *Hughes,* 278 U. S. 496, 497, 49 S. Ct. 231, 73 L. Ed. 473;

Chesapeake & Ohio v. *Stapleton,* 279 U. S. 585, 49 S. Ct. 442, 73 L. Ed. 861.

II.

It is hornbook law that the evidence showing Morgan's inability to operate the coupler in the usual and ordinary way with his hand, thus making it necessary for him to climb up on the car and put his weight upon the pin lifter is sufficient to show a violation of the Safety Appliance Act.

Delk v. *St. L. & S. F. R. Co.,* 220 U. S. 580, 586, 31 S. Ct. 617, 55 L. Ed. 590, 595.

C. B. & Q. R. Co. v. *U. S.,* 220 U. S. 559, 574, 575, 31 S. Ct. 612, 55 L. Ed. 582;

St. Louis, etc. R. Co. v. *Taylor,* 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061;

C. R. I. & P. v. *Brown,* 229 U. S. 317, 320, 33 S. Ct. 840, 57 L. Ed. 1204;

Minnesota & St. L. R. Co. v. *Gotschall,* 130 Minn. 33, 153 N. W. 120; Aff. 244 U. S. 66, 67, 37 S. Ct. 598, 61 L. Ed. 955;

Davis v. *Minneapolis & St. L. R. Co.,* 159 Minn. 802; cert. den. 242 U. S. 650, 37 S. Ct. 243, 61 L. Ed. 545;

Minneapolis, St. P. & St. Ste. M. R. Co., v. *Popplar*, 141 N. W. 798; Aff. 237 U. S. 369, 370, 35 S. Ct. Rep. 609, 59 L. Ed. 1000.

III.

Injury from the violation of the Safety Appliance Act is actionable under the Federal Employers' Liability Act. *S. A. & A. P. Co.* v. *Wagner*, 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110. *B. & O.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419, *Moore* v. *C. & O.*, 291 U. S. 205, 54 S. Ct. 402, l. c. 404, 78 L. Ed. 755.

IV.

There was direct testimony of witnesses Harrell and Dodds showing the violation of the Safety Appliance Act was the proximate cause of decedent's death, but aside from this direct testimony the physical facts and the circumstances shown by the evidence were sufficient within themselves to show proximate cause.

V.

While this case was based upon Federal Statutes it was triable under the local rules of practice and procedure in the State courts, *C. & O. R. Co.* v. *De Atley*, 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016, *Central Vt. R. Co.* v. *White*, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433, hence the laws of the State of Oklahoma govern in regard to the necessity for and manner of saving exceptions and in the matter of motions for new trial.

Under the laws and decided cases of the State of Oklahoma it is the duty of the judge *sua sponte* to properly instruct the jury, Sec. 359, Oklahoma Statutes 1931, as follows to-wit:

"Fifth. * * *. The court shall give general instructions to the jury, which shall be in writing, and be

numbered, and signed by the judge, if required by either party."

His failure to do so, the first assignment of error in petitioner's motion for new trial and the sixth assignment in her petition in error, were sufficient to preserve the error for review in the Supreme Court of Oklahoma and this Court, *First National Bank of Wetumpka* v. *Nolan,* 59 Okla. 20, *First National Bank of Mounds* v. *Cox,* 83 Okla. 1, and this is true even though the court should give an erroneous instruction offered by the complaining party and not excepted to, *Younger* v. *Blanchard Hardware Co.,* 120 Okla. 279.

The effect of the giving of the instructions complained of completely eliminated the application of the Federal Employers' Liability and Safety Appliance Acts from the case and submitted it to the jury upon the common law and petitioner was thereby deprived of a Federal right, to-wit, the right to have her case submitted to the jury under said Acts.

The jury must consider the instructions as a whole and to enable them so to do the instructions must be consistent and harmonious for if they are inconsistent, inharmonious and irreconcilable, confusion results, and the greater the effort to reconcile the irreconcilable the greater the confusion, and when this irreconcilability, inconsistency and confusion appear in the instructions the judgment must be reversed for the reason that the court is unable to tell which instructions the jury followed and which it ignored, *First National Bank* v. *Nolan,* 59 Okla. 20, 157 Pac. 754.

Argument.

I.

A failure of a coupler to work at any time and under any circumstances is sufficient to sustain a charge that the Act has been violated. This is set forth in the case of *Delk* v. *St. L. & S. F. R. Co.,* 220 U. S. 580, 586, 31 S. Ct. 617,

55 L. Ed. 590, 595, and in the case of *C. B. & Q. R. Co.* v. *U. S.*, 220 U. S. 559, 574, 575, 31 S. Ct. 612, 55 L. Ed. 582, l. c. 588, quoting from the case of *St. Louis, etc. R. Co.* v. *Taylor*, 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061, as follows, to-wit:

> "'* * * The obvious purpose of the Legislature was to *supplant the qualified duty of the common law with an absolute duty deemed by it more just.* If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts.'" * * *

This doctrine was reiterated and affirmed by the Supreme Court in the case of *C. R. I. & P.* v. *Brown*, 229 U. S. 317, 320, 33 S. Ct. 840. l. c. 841, 57 L. Ed. 1204, in the following language:

> "* * *. And the concession is made that in the *Taylor* case, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. Rep. 616, and in *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. Ed. 582, 31 Sup. Ct. Rep. 612, this court settled that the failure of a coupler to work at any time sustains a charge of negligence in this respect, *no matter how slight the pull on the coupling lever.*" * * * (Italics ours).

That a coupler fails to function when in a position so to do is sufficient evidence of its defective character, *Minnesota & St. L. R. Co.* v. *Gotschall*, 130 Minn. 33, 153 N. W. 120; Aff. 244 U. S. 66, 67, 37 S. Ct. 598, 61 L. Ed. 955, and in the case of *Davis* v. *Minneapolis & St. L. R. Co.*, 159 Minn. 802; cert. den. 242 U. S. 650, 37 S. Ct. 243, 61 L. Ed. 545, the Supreme Court of the State of Minnesota used the following language in enunciating this principle, l. c. 802:

> "The very fact that a mechanical contrivance fails to work, when a fair attempt is made to operate it in a proper manner, tends to prove either that something is out of order, or else that the contrivance is of faulty design or construction."

In the case of *Minneapolis, St. P. & St. Ste. M. R. Co.* v. *Popplar*, 141 N. W. 798; affirmed 237 U. S. 369, 370, 35 S. Ct. Rep. 609, 59 L. Ed. 1000, the situation was analogous to the one here existing. The injury was received by the decedent, a brakeman, while he was uncoupling a car which was being "kicked" to a siding and recovery was sought because of noncompliance with the Safety Appliance Act. Upon the trial a motion was made for a directed verdict because the evidence failed to show neglect on the part of the railroad company and did establish contributory negligence, which motion was denied.

The testimony showed that decedent, on giving the stop signal, attempted to uncouple the "head" car that was to be left to run of its own momentum on the siding; he tried repeatedly to do this by pulling the coupling pin with the lifter at the end of the next car but without success and then stepping between the two cars, while they were moving at a rate of about four miles an hour, in order to effect the uncoupling by hand, he was run over and killed. The conductor, a witness for the company, who examined the coupling apparatus soon after the accident, testified that it worked with difficulty and that he would have reported it as a bad coupler had it been brought to his attention. It will, therefore, be perceived that the facts as to the condition of the coupler existing in *Popplar's* case also existed herein because Morgan testified he could not manipulate the coupler with his hand (R. 63-64, 65), and, under identical circumstances hereafter referred to, did manipulate it by putting his weight upon the pin lifter with his foot (R. 63, 76, 170). He further testified that on many other

occasions it had been necessary for him to operate this particular type of coupler in like manner (R. 67) and that he did not believe he could have operated it with his hand the second time even after the engineer had given him slack (R. 76-78).

In affirming the judgment in the *Popplar* case the Supreme Court of the United States said, l. c. 609:

> "* * *. Without going into the evidence in detail it is sufficient to say that we find no ground for reversal in the ruling that there was enough to go to the jury upon the question whether, in fact, the coupler was defective." * * *

The evidence shows that after the drag which was pulled out of the Compress switch track the 14 cars were shoved from two to four car lengths before they were stopped the first time (R. 180) and that the engine was moved only 6 feet the second time before the cut was made (R. 173, 176), which petitioner contends is a circumstance in her favor because *if sufficient slack could not be accumulated to enable the cut to be made by shoving the cars from two to four car lengths, certainly sufficient slack for such purpose could not be accumulated by shoving the engine only 6 feet,* because the evidence most favorable to petitioner shows that the amount of slack between two freight cars is 16 inches, and, inasmuch as it is claimed the uncoupling could not be made because the cars were on a stretch on account of absence of slack, due to grade, the same having run out when the first stop was made, therefore, merely moving the engine 6 feet could only accumulate 72 inches of slack, not including the distance the cars would have rolled by gravity (?) before the slack was accumulated by the shoving of the engine, whereas, there would be 160 inches of slack to be accumulated up between the engine and the 11th car (the nearest car of the four to be cut off to the engine)

before there was slack created at the point where the pin was to be pulled.

It, therefore, is demonstrated that the evidence in this case proves conclusively that the failure of the coupler to operate was due to inherent defects and not to absence of slack.

II.

The Court in its opinion states that petitioner conceded there was no evidence of a violation of the Federal Employers' Liability Act. However, this is too broad a statement of her contention because it was not only conceded in the pleadings (R. 23) but stipulated in open court that at the time decedent was killed both he and the respondents were engaged in interstate transportation (R. 27) and, if such was the case, then the violation of the Safety Appliance Act was also a violation of the Federal Employers' Liability Act.

The Federal Employers' Liability Act clearly recognizes that rights of action may arise out of a violation of the Safety Appliance Act and a disregard of the command of the statute is a wrongful act and the right to recover damages is implied. The two statutes are in *pari materia* and the clause in the Federal Employers' Liability Act "due to its negligence" is construed to mean that Congress intended to treat a violation of the Safety Appliance Act as negligence *per se*. Roberts Federal Liability of Carriers, Sec. 783, *San Antonio & A. P. R. Co.* v. *Wagner*, 241 U. S. 476, 36 S. Ct. 621, 60 L. Ed. 1110.

This interpretation is specifically affirmed in the case of *B. & O. R. Co.* v. *Groeger*, 266 U. S. 521, 69 L. Ed. 419, 45 S. Ct. 169, l. c. 172, in which the Supreme Court of the United States said:

> "That act was passed to promote the safety of employees and is to be read and applied with the federal

> Employers' Liability Act. Under the latter, defendant is liable for any negligence chargeable to it which caused or contributed to cause decedent's death (section 1), and he will not be held guilty of contributory negligence (section 3) or to have assumed the risks of his employment (section 4) if a violation of section 2 of the Boiler Inspection Act contributed to cause his death." * * *

It must, therefore, be perfectly apparent that in this case if the parties were engaged in interstate transportation and the Safety Appliance Act was violated the Federal Employers' Liability Act was also violated, *Moore* v. *C. & O.*, 291 U. S. 205, 54 S. Ct. 402, l. c. 404, 78 L. Ed. 755.

III.

The pertinent evidence upon the question of proximate cause most favorable to petitioner is as follows to-wit:

That it was decedent's duty to go on top of the most northerly car of the drag and get ready to set the brake after Morgan cut off the four cars (R. 75, 87); that while decedent was throwing the switch Morgan walked toward the near end on the west side of the track about three car lengths, giving the engineer a signal to back up (R. 63), during which time the train moved back north at a rate of two or three miles per hour (R. 161, 179); that as the cars came back decedent caught the first car and climbed up the east side of the north end thereof, and was doing something with the brake wheel (R. 36, 51, 52); that when the cars had moved back from two to four car lengths (R. 180) Morgan gave the engineer a stop signal (R. 64) and attempted to cut the four cars off by use of the pin lifter (R. 63, 73) but could not uncouple them (R. 63, 65-66, 78) although he applied enough force ordinarily for that purpose (R. 65) as the engineer stopped the drag (R. 176); that in a very short time after

decedent was seen at the brake wheel he was seen falling from the top of the car (R. 31-32, 51) at which time the cars were still "all in line" (R. 37); that the length of a box car is around 40 feet (R. 112); that the engineer then received a back-up signal from Morgan and backed the engine about 6 feet further (R. 174, 176) when he received a stop signal and applied the brakes and stopped the drag the second time (R. 170), and the cars were cut off (R. 167); that Morgan had to climb upon the car and put his weight on the pin lifter before he could operate the coupler (R. 63, 76, 170); that Morgan then threw the switch and signalled the engineer to back on the Compress track (R. 99); that thereafter the engineer saw decedent's body, after the four cars which had been cut off had run over it, and signalled Morgan (R. 162, 165); that a piece of decedent's raincoat was found hanging in the frog of the switch (R. 86); that the distance from the switch stand to the frog was 81½ feet (R. 128); that witness Robinson testified decedent fell from the car just after it had cleared the frog of the switch (R. 35) north of the switch stand (R. 128); that witness Boone testified the first place he saw any evidence of where decedent had fallen was where the chat on the roadbed appeared to have been disturbed 120 feet north of the Compress switch, at which point he found decedent's hat and switch club (R. 157-158); that his body was found 210 feet further north (R. 158); that his boots were off (R. 34) and laying near the body (R. 158); that if the coupler had functioned the first time Morgan tried to operate it by jerking the pin lifter two or three times, the cut would have been made and the four cars would have rolled away from the train when the engine stopped, at the same speed at which they were moving at the time they were cut off, and there would have been no jolt, jar or stop (R. 75, 88, 111-112); that if the engineer merely released the brake the engine is so much

heavier than the cars it would roll faster than the cars and push them together, thereby bunching the slack so that there would be sufficient slack to permit the uncoupling of the cars (R. 98); that the slack would start at the first car and run out the rear car as soon as the engine stopped; that it does not run out simultaneously but from car to car causing some jar to the first car and getting greater until the rear car is reached where it would cause a jerk even though the train was barely moving; that this is shown by impactographs which are used to determine how rough switchmen handle cars (R. 99-100), and that such a jerk is sufficient to throw a man not expecting it from the top of a car (R. 88, 108, 111), and that while a switchman was jerking the pin lifter two or three times and climbing on the car to put his weight on it with his foot the drag would move 50 or 60 feet (R. 112).

Petitioner was not absolutely bound by witness Morgan's testimony in regard to there being no jerk or jar when the train was stopped, *Baldassare* v. *Penn. R. Co.*, 24 Fed. (2d) 201 (C. C. A. 6); *Perryman* v. *Mo. Pac.*, 31 S. W. (2d) 4; *Vanausdol* v. *Bank of Odessa*, 5 S. W. (2d) 109; *Woodward* v. *So. Pac. Co.*, 94 Pac. (2d) 1028, l. c. 1034, and the testimony of witnesses Harrell and Dodds that when the slack ran out of the string of cars after the engine had stopped there would be a jerk or a jar is substantial testimony of such fact and not to be disregarded, *Preston* v. *Western Union*, 250 Fed. 480; Aff. 254 Fed. 229; cert. den. 248 U. S. 585, 63 L. Ed. 433, 39 S. Ct. 182; *Cropper* v. *Titanium Pigment Co.* (C. C. A. 8), 47 Fed. (2d) 1038, 78 A. L. R. 737. Note: 78 A. L. R. 755, 22 C. J. 639, Sec. 733, page 728, Sec. 823, 11 R. C. L. 574, Sec. 7, page 584, Sec. 14, page 586, Sec. 16. 1 Wigmore on Evidence 1081, Sec. 673, 4 Wigmore 115, 116, Sections 1920, 1921.

Evidence must be viewed in a light most favorable to plaintiff on a motion for a directed verdict, *Wade* v. *C.*

& O. R. Co., 14 Fed. (2d) 90 (CCA 4). *Falstaff Brewing Ass'n* v. *Thompson*, 101 Fed. 301; cert. den. 59 S. Ct. 834, 307 U. S. 631, 83 L. ed. 1514, and an adversary's evidence may be used so far as it supports plaintiff, *Alpine Forwarding Co.* v. *Penn. R. Co.*, 60 Fed. (2d) 734; cert. den. 53 S. Ct. 93, 387 U. S. 647, 77 L. ed. 559.

Proximate cause and causation under the Federal Employers' Liability Act are questions of fact and should not be withdrawn from the jury if reasonable men might reach different conclusions from the evidence, *Southern Pac. R. Co.* v. *Ralston*, 67 Fed. (2d) 958 (CCA 10); *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469, 474, 24 L. ed. 256.

The Federal rule defining proximate cause and its application to facts is laid down in the case of *Milwaukee & St. P. Ry. Co.* v. *Kellogg*, 94 U. S. 469, l.c. 476, 24 L. ed. 256, and is as follows, to-wit:

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place. Scott *v.* Shepherd (Squib case), 2 W. Bl., 892. The question always is: was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act

not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act. * * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. *In such case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary result, and self operating, which produced the injury.* Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the new circumstances existing at the time." (Italics ours).

This rule has been strictly adhered to by the Supreme Court of the United States and in the case of *Insurance Co.* v. *Boone*, 95 U. S. 130, 24 L. ed. 395, the Supreme Court of the United States said:

> "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

It is only where, under the evidence, reasonable minds could draw but one conclusion that the question of proximate cause ever becomes a question of law, *Montgomery Ward & Co.* v. *Snuggins*, 103 Fed. (2d) 458; *Egan Chevrolet Co.* v. *Brunner*, 102 Fed. (2d) 373, l.c. 377; *Pitcairn* v. *Brandies*, 87 Fed. (2d) 928, l.c. 929; cert. den. 301 U. S. 706, 81 L. ed. 1460, 57 S. Ct. 939; see also *So. Pac.* v. *Ralston*, 62 Fed. (2d) 1026, 67 Fed. (2d) 958.

If the evidence is such that a jury might base an inference upon it and if different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves, *Norfolk & W. Ry. Co.* v. *Hawser*, 211 Fed. 567, l.c. 571; cert. den. 231 U. S. 749, 58 L. ed. 465, 34 S. Ct. 321; *Washington Gas L. Co.* v. *Landsden*, 172 U. S. 534, 19 S. Ct. 296, 43 L. ed. 543; *Marande* v. *T. & P. R. Co.*, 184 U. S. 173, 22 S. Ct. 340, 46 L. ed. 487.

On appeal from a judgment entered after directed verdict all facts that the evidence reasonably tended to prove and all inferences that reasonably might be drawn therefrom will be assumed to have been established, *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. ed. 720; *Lumber Co.* v. *U. S.*, 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 491; *Clay County C. Co.* v. *Home L. Ins. Co. of N. Y.*, 113 Fed. (2d) 856, 859, and

the weight of uncontradicted evidence and the creditability of witnesses are questions for the determination of the jury, *Clay County C. Co.* v. *Home L. Ins. Co. of N. Y.*, 113 Fed. (2d) 856, l.c. 859; *Elzig* v. *Gudwangen*, 91 Fed. (2d) 434.

It is only where the evidence is so overwhelming on one side as to preclude an opportunity for reasonable minds to differ that the court should direct a verdict, *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. ed. 720; *So. Pac. Co.* v. *Poole*, 160 U. S. 438, 16 S. Ct. 338, 40 L. ed. 485; *Clay County C. Co.* v. *Home L. Ins. Co. of N. Y.*, 113 Fed. (2d) 856, 859. The rule that uncontradicted evidence must be accepted as true does not apply where there is something in other evidence, or in the tale itself furnishing a basis for discrediting it, or for fixing fault in defendant it seeks to exonerate, *Gibson* v. *So. Pac.*, 67 Fed. (2d) 758; cert. den. 291 U. S. 637, 54 S. Ct. 458, 78 L. ed. 1062.

It is only when the facts are clearly settled and but one inference is possible to be drawn therefrom that the question of proximate cause becomes one of law, *Donegan* v. *B. & N. Y. R. Co.*, 165 Fed. 869, l.c. 871, 872.

However, the law of proximate cause has been relaxed under the Federal Employers' Liability and Safety Appliance Acts. Roberts Federal Liability of Carriers, Vol. 2, 2d Edition, p. 1703:

> "* * * The statute does not attempt to legislate upon the purely logical problem of determining the cause or causes of injury, but directs its mandate towards the problem of fixing liability for the injury. Logic may conclude that the injury resulted from the negligence of the employer, the employee's own want of care, the default of a stranger to the employment, an act of God, or pure accident, or from a combination of any or all of these factors. But after logic has thus determined the causal basis of the injury, the statute steps in to say that if, among these causes, there is negligence on the part of the employer, as that term

> is understood in the act, liability of the employer shall follow, irrespective of the other factors causally related to the injury. He may not escape liability for injury 'resulting in whole or in part from' his negligence, even if the negligence of the injured employee or some other factor was logically nearer to, or more influential in producing that injury. In the words of Mr. Justice Holmes: 'We must look at the situation as a practical unit, rather than inquire into a purely logical priority.' "

In the case of *N. Y. Central R. Co.* v. *Brown*, 63 Fed. (2d) 657; cert. den. 290 U. S. 634, 78 L. ed. 551, 54 S. Ct. 52, while a crew was attempting to couple a switch engine to a refrigerator car an automatic coupler on the latter failed to "make" and the impact started it moving down grade toward a tunnel of the defendant. Seeing the car start the plaintiff, realizing that unless it could be stopped at once it might cause injury, attempted to board the same for the purpose of applying the brake wheel on top of the car. He mounted the side of the car, and, in hurrying to reach for the brake wheel, brushed an overhead electric third rail, from which he received a shock which caused him to fall to the ground and sustain serious injuries, and the question arose as to whether or not the failure of the appliance on the refrigerator car, or the close proximity of the third rail, was the proximate cause of his injury, and the court in deciding that the defective coupler was the proximate cause said, l.c. 658:

> "But it has long been settled that the chain of causation is not broken by an intervening act which is a normal reaction to the stimulus of a situation created by negligence, and such normal reaction has been held to include the instinct toward self-preservation, Scott *v.* Shepard, 2 W. Bl. 892 (the lighted squib case), and the equally natural impulse to rush to others' assistance in emergency, Wagner *v.* International Railway

Co. (Cardozo, C. J.), 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1 (the danger invites rescue doctrine). This rule of causation has been repeatedly recognized by this court. Sandri *v.* Byram (C. C. A.) 30 F. (2d) 784, 786; Erie Railroad Co. *v.* Caldwell (C. C. A.) 264 F. 947."

The test of whether there is a causal connection between the alleged negligence and the injury is whether the facts show that absent the negligent act the injury would not have occurred, *P. & R. Co.* v. *Auchenbach,* 16 F. (2d) 550, 551; cert. den. 273 U. S. 761, 47 S. Ct. 476, 71 L. Ed. 878. *Spokane & Inland Empire R. Co.* v. *Campbell,* 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125.

Applying this principle to the facts in evidence herein where it is shown that the train was moving back at a speed from two to three miles per hour, that decedent was upon the far end thereof, that Morgan gave a stop signal, that the engine stopped the train, that the coupler failed to operate uncoupling the cars when Morgan attempted to pull the pin, and the decedent fell between the rails of the track within the distance the cars moved (from 2 to 4 car lengths) between the time Morgan gave a come-ahead signal to the engineer and a stop signal, it is conclusive that decedent lost his balance and fell from the top of the car to the road-bed. NO INTERVENING CAUSE WAS SHOWN. There was not a scintilla of evidence in the record from which it could be inferred that anything else caused the death of decedent than that he fell from the car as the result of the unexpected stopping of the four cars when the coupler failed to function. The cases in which the facts are analogous are legion and we desire to call the court's attention to a few of them, and figments of the imagination, conjecture and speculation as to things which might have caused decedent to fall are not to be considered.

The opinion suggests several things which might have caused decedent to fall, but there was no evidence thereof and, in the absence of direct testimony, the simple suggestion of theories does not reduce the jury to mere speculation and disqualify it from determining the cause of the injury complained of, *Wabash Screen Door Co.* v. *Black* (C. C. A. 6), 126 F. 721, 725. See, also, *Roebuck & Co.* v. *Peterson* (C. C. A. 8) 76 F. (2d) 243. *Reading Co.* v. *Geary* (C. C. A. 4), 47 F. (2d) 142, 145, 79 A. L. R. 226. *Perkins* v. *Northern Pac. Ry. Co.* (C. C. A. 9), 199 F. 712, 715. *Railway Express Agency* v. *Little* (C. C. A. 3), 50 F. (2d) 59, 75 A. L. R. 963. *Chesapeake & O. Ry. Co.* v. *Cowley* (C. C. A. 4), 166 F. 283, 284.

The court takes judicial notice of the laws of physics and they will not be ignored. *Rome Ry. & Light Co.* v. *Keel*, 60 S. E. 468. *Marande* v. *Texas & Pac. R. Co.*, 184 U. S. 173, 46 L. Ed. 487, 22 S. Ct. 340. *United States* v. *Joergenson*, 66 F. (2d) 292. *United States* v. *McCreary*, 61 F. (2d) 804. *United States* v. *Kerr*, 61 F. (2d) 800, this being true then the law of inertia applies to the relationship existing between decedent, the car upon which he was riding and the movement thereof. Inertia is defined in Webster's International Dictionary as being "that property of matter by which it tends when at rest to remain so, and when in motion to continue in motion, and in the same straight line or direction in which it is moving, unless acted upon by some external force." Hence in the case at bar we have the box car with decedent upon the far end thereof moving at the speed referred to in evidence, at which decedent expected it would continue until overcome by a force which he himself intended to apply by use of the hand brake. He would, therefore, not be expecting any stoppage of the car or himself. However, when Morgan gave the engineer the stop signal and the engineer stopped the drag and Morgan attempted to pull the pin and the coupler did not

open, the relationship existing between the inertia of the box car and the inertia of decedent was destroyed by the stopping of the box car and the continuing of decedent in the line of movement already started, thereby upsetting the equilibrium of decedent and causing him to lose his balance and fall from the end of the car. As decided in the case of *C. R. I. & P.* v. *Ward*, 252 U. S. 18, 40 S. Ct. 275, 64 L. Ed. 430, the failure of the switchman to pull the pin, causing the cars to stop, was actionable negligence, whereas, herein, the violation of the Safety Appliance Act by reason of the inoperative coupler constituted a violation of law for which respondents would be liable and therefore would be substituted for the actionable negligence in the *Ward* case.

It is, therefore, conclusively shown that a failure of the coupler to operate caused the car upon which decedent was riding to be stopped and decedent to be thrown therefrom and that such failure was the proximate cause thereof.

The rule prohibiting the accumulation of inferences is applied when necessary to guard against attenuated reasoning as where an initial inference is drawn from a fact and other inferences are built solely and cumulatively upon the first so that the conclusion reached is too remote and has no sound logical foundation in fact. However, the underlying question is whether the conclusion hypothesized can fairly be drawn from the proven facts by reasonably intelligent minds, 1 Jones on Evidence, Civil Cases, 4th Ed. Sec. 137, p. 238. The logical process involved cannot be governed by an inflexible rule. It is not the law which furnishes the test of relevancy, 1 Greenleaf on Evidence, 16th Ed. Sec. 14, p. 36. Sometimes courts hold rather summarily that circumstances taken as a whole support an inference of liability without inquiring critically into the reasoning by which that conclusion is reached. Sometimes also it is said the same fact raises several concurrent infer-

ences, thus avoiding the objection that they are piled. It is well settled that any number of inferences may be drawn in a given case so long as each has a factual foundation. The doctrine has often been assailed or limited in particular cases, 1 Greenleaf on Evidence, 16th Ed. Sec. 14, p. 36, 37; Wigmore on Evidence, 2d Ed. Sec. 41, p. 258; 1 Jones Commentaries on Evidence, 2d Ed. Sec. 11, p. 22; 20 Am. Jur., Sec. 165, p. 169, 95 A. L. R. p. 162, 182, Note. And while a jury may not guess or conjecture as to possible explanation to account for a result, yet it may draw inferences from circumstances contemporaneous with or surrounding the occurrence, *N. & W. Ry. Co.* v. *Hauser*, 211 Fed. 567; cert. den. 231 U. S. 749, 34 S. Ct. 321, 58 L. Ed. 465; *Baltimore & P. Ry. Co.* v. *Landringham*, 191 U. S. 461, 24 S. Ct. 137, 48 L. Ed. 262.

This question was before the Circuit Court of Appeals for the 8th Circuit in the case of *Falstaff Brewing Corp.* v. *Thompson*, 101 F. (2d) 301, and the court in enunciating the rule to be applied said, l.c. 305:

> "It is also argued that the fact that the red panel truck bore defendant's name is used as the basis of three presumptions: first, that ownership of defendant is presumed, second, that it was driven by an employee of defendants, and, third, that he was then engaged in the business of defendant; and hence, that there was a pyramiding of presumptions, contrary to the rule to the effect that one presumption can not be based upon another presumption. It is, however, permissible to draw several conclusions or presumptions of fact from the same state of facts or circumstances. But however that may be, there is evidence that the truck could not have been operated at the time except by a driver of defendant on defendant's business. We have already referred to this testimony. It is perfectly proper that a series of facts and circumstances be used as the basis for ultimate findings or inferences. We conclude that

the court properly denied defendant's motion for a directed verdict."

The opinion is not clear as to just what inference is piled upon another inference. The facts in the case show that the coupler did not operate, from which it states an inference may be drawn that it was defective. It then states that the jury must further infer that the defect in the coupler caused a jerk or jar of the car upon which decedent was standing, but such an inference is unnecessary because we have the expert testimony of witnesses Dodd and Harrell that such a stop would cause a jerk or a jar at the end car when the slack run out, which is substantial evidence, as shown heretofore. However, we do have the positive evidence that the cars stopped. We have the positive evidence that Essary fell from the cars and petitioner will hereafter show that it is not necessary where there is a violation of the Safety Appliance Act, or even only a violation of the Federal Employers' Liability Act, that a jerk or jar be shown before liability attaches. It is only necessary that there be negligence in the unexpected stopping of the cars sufficient to cause a man thereon to lose his balance and fall. Certainly, in this case there is a chain of causation running directly from the failure of the coupler to operate to the death of decedent.

There are many cases in the books where liability rested wholly upon the circumstances attending the death of a person with no eye witness at all, and we will cite the Court a few of such cases. In the case of *Choctaw* v. *McDade*, 191 U. S. 64, 48 L. Ed. 96, 24 S. Ct. 24, the evidence showed that McDade was a brakeman and was killed while discharging his duties and at his post of duty, and when last seen was transmitting a signal from the conductor to the engineer to run past the station of Goodwin, Arkansas, which was passed at a speed of from 20 to 25 miles an hour.

At Goodwin there was a water tank, having attached thereto an iron spout which when not in use hung at an angle from the side of the tank. Shortly after passing Goodwin, McDade was missed, and, upon a search being instituted, his lantern was found near the place on the car where he was at the time of giving a signal. His body was found at a distance of about 675 feet beyond the Goodwin tank. There was testimony tending to show from the location of the water spout and the injuries upon the head and person of McDade *that he could have been killed* as the result of being struck by an overhanging water spout; that the car upon which he was riding was wider and higher than the average car, and the court in affirming a judgment in favor of the plaintiff said, l. c. 65, 66:

> "There was no eye witness as to the exact manner of the injury to McDade * * *. While the evidence was circumstantial it was ample, in our opinion, to warrant the submission of this question to the jury under the instructions given."

In the case of *Kulp* v. *The Chicago, St. P. M. & O. R. Co.*, 88 F. (2d) 466, cert. den. 300 U. S. 700, 81 L. Ed. 1355, 57 S. Ct. 930, the decedent was missed about 2:35 in the morning and at 4:00 A. M. his severed body was found partly between the rails about 25 or 26 feet east of the Lindale Bridge and it was contended he had struck the bridge and not a defective warning appliance. There were no eye witnesses and the court in holding the defendant liable said, l. c. 471:

> "Concededly in passing upon a defendant's motion to direct a verdict it is the duty of the court to take the most favorable view of the plaintiff's evidence, and the inferences reasonably and legitimately to be drawn therefrom. Worthington *v.* Elmer (C. C. A. 6), 207 Fed. 306. And where, as here, on the evidence, reasonable men might well find that a man found in a mangled

condition and dead was killed as a result of contact with a defective warning appliance, and it cannot be said that no such conclusion could be reached on the testimony, the question should be submitted to the jury. Paraphrased from Myers *v.* Pittsburgh Coal Company, 233 U. S. 184, 34 S. Ct. 559, 561, 58 L. Ed. 906. In the case just cited, the trial court did submit the case to the jury, and a verdict for plaintiff resulted. The Circuit Court of Appeals (203 Fed. 221), reversed, largely upon what it regarded '*want of definite proof as to the manner in which Myers came to his death,—whether by contact with the wire, or, if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark, and mistakenly supposed himself to be in a place of safety.*'

"The Supreme Court reversed the Circuit Court of Appeals, saying: 'In our opinion, the trial court properly left the question to the jury upon testimony which, when fairly considered, might sustain the verdict. See Humes *v.* United States, 170 U. S. 210, 18 S. Ct. 602, 42 L. Ed. 1011.' " (Italics ours.)

In the case of *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, 34 S. Ct. 559, 58 L. Ed. 906, the facts were that the body of decedent Myers was found at a place where a trolley wire passed over the tracks in the side entry of a mine at a distance of about 5 feet 7½ inches above the rail, making it necessary for one of ordinary height to remain seated in the car or stooped down. The roof of the entry was about 9 feet above the rail at this point. There was no light at this switch nor was the wire guarded in any way. It also appears that because of the ineffective carbons the headlight on the motor car was not burning and had not been burning for several days. The motorman testified that when the headlight was burning he could see objects on the

track clearly at a distance of 25 or 30 feet and that he could stop his car in about 13 feet. The motor car suddenly ran upon something, was stopped, and it was found that Myers had been run over. His body was lying in the middle of the track with his head toward the motor, and his cap upright with the light still burning was laying beside the track. His body was badly torn and mangled before the motor car could be stopped. The trial court submitted the case to a jury which returned a verdict in favor of his wife, which the Circuit Court of Appeals reversed and remanded, and the Supreme Court of the United States in reversing and the Circuit Court of Appeals in affirming the judgment of the District Court, said l. c. 560-561:

> "The opinion of the circuit court of appeals placed the reversal largely upon the want of definite proof as to the manner in which Myers came to his death. * * * that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death. This question, however, was submitted to the jury and found against the defendant in the trial court. Unless the testimony was such that no recovery can be had upon the facts shown in any view which can be properly taken of them, the verdict and judgment of the district court must be affirmed.
>
> "That there was ample testimony to carry the question of negligence to the jury we have already said, and in any case it cannot be said as a matter of law that there was no evidence tending to show that Myers came to his death by the negligence of defendant in one or more of the ways charged in the petition. Considering the testimony, as it must be considered in determining questions of this character in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came

in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry or in the motor car. We think reasonable men, considering the testimony adduced, might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon testimony which, when fairly considered, might sustain the verdict. See Humes *v.* United States, 170 U. S. 210, 42 L. Ed. 1011, 18 Sup. Ct. Rep. 602."

It would be an endless task to recite the facts and quote from the number of cases where there were no eye witnesses, the evidence was only circumstantial and much less satisfactory than the evidence in the case at bar. This brief is already too long but for the ready reference of the Court in case it should decide to pursue the subject further, we refer it to the following cases: *Ward* v. *Denver & R. G. R. Co.*, 85 Pac. (2d) 837, where a switchman fell from the top of a car when it was suddenly slowed, and was killed. *Philadelphia & R. R. Co.* v. *Bartsch*, 9 F. (2d) 858, l. c. 859, where decedent, a brakeman, had climbed on the top of a car when the train, on signal came to a stop, lost his balance, fell, and was killed.

Chesapeake & O. R. Co. v. *Smith*, 42 F. (2d) 111, cert. den. 51 S. Ct. 321, where a brakeman was injured when the brakes suddenly were applied and the train stopped.

Thompson v. *Minn. & St. L. Ry. Co.*, 158 N. W. 43, where a conductor signalled a train to stop, which caused decedent to fall therefrom and be killed.

Hurley v. *Ill. Cent. R. Co.*, 157 N. W. 1005, in which decedent was crushed between two cars.

McAllister v. *St. L. Merchants B. R. Ry.*, 25 S. W. (2d) 791, in which decedent's body was found between the rails of a track over which had passed two cars he was supposed to ride and brake.

Meek v. *N. Y. C. & St. L. R. Co.*, 88 S. W. (2d) 333, cert. den. 297 U. S. 722, 56 S. Ct. 668, in which a switchman was found dead shortly after he had been seen attempting to open a coupler.

Williamson v. *St. L. & S. F. R. Co.*, 74 S. W. (2d) 583, in which decedent was found dead shortly after he had been seen to step from the ladder of a car to the ground and walked about 10 feet. *Trusdale* v. *Wheelock*, 74 S. W. (2d) 585, in which decedent's body was found under a car on a railroad track.

Petitioner again urges the case of *C. R. I. & P. R. Co., et al.*, v. *Ward, infra*, upon the attention of the Court, believing that the opinion herein is in conflict with said case. This case was decided by the Supreme Court of Oklahoma and is found at 173 Pac. 212, 252 U. S. 18, 40 S. Ct. Rep. 275, 64 L. Ed. 430. The Supreme Court of the United States in detailing the facts said, l. c. 275:

> "* * *. It appears that at the time of the injury to Ward, the cut of the cars had been pushed up an incline by the engine, over an elevation, and as the cars ran down the track the effect was to cause the slack to run out between them permitting them to pull apart sufficiently to be uncoupled, at which time it was the duty of the engine foreman to uncouple the cars. The testimony tended to support the allegations of the petition as to the negligent manner in which this operation was performed at the time of the injury, showing the failure of the engine foreman to properly cut off the cars at the time he directed the engineer to retard the speed of the engine, thereby causing them to slow down in such manner that when the check reached the car upon which Ward was about to set the brake, he was

suddenly thrown from the top of the car with the resulting injuries for which he brought this action."

And in affirming a judgment for Ward said, l. c. 276:

"Applying the principles settled by these decisions to the facts of this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached. For the lack of proper care, on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the connection. * * *"

The only difference between the *Ward* case and the case at bar is that Ward was precipitated from the end of the car by the sudden slowing due to the negligent failure of the pin puller to uncouple the cars, whereas, in the case at bar decedent was thrown from the end of the car by reason of the violation of the Safety Appliance Act. If anything, the case made by petitioner is stronger than the one made in the *Ward* case.

We further desire to call the court's attention to the case of *Texas & P. R. Co.* v. *Behymer,* 189 U. S. 468, 47 L. Ed. 905, where a brakeman was required to get out on the top of cars when they had snow and ice thereon. While he was upon the cars the engine moved to the main track and stopped suddenly and the cars ran forward to the extent of the slack and back again, as they were moving *up hill*, which upset Behymer's balance, the bottom of his trousers caught

in a projecting nail on the running board and he was thrown between the cars, and the Supreme Court of the United States in affirming a judgment in his favor said, l. c. 469:

> "* * *. It is true that the jury might have drawn a different conclusion from his evidence, or have disbelieved it in essential points, but they also were at liberty to find, as they must be taken to have found, that the foregoing statement is true. * * *
>
> "* * *. What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not. *Wabash R. Co.* v. *McDaniels*, 107 U. S. 454, 27 L. Ed. 605, 2 Sup. Ct. Rep. 932. No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of. Yet, it can be avoided, if necessary, *and when the particular and known condition of the train makes a sudden bump, obviously dangerous to those known to be on top of the cars*, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty. If it was negligent to stop as the train did stop, the risk of it was not assumed by the plaintiff. *Texas & P. R. Co.* v. *Archibald*, 170 U. S. 665, 42 L. Ed. 1188, 1191, 18 Sup. Ct. Rep. 777." (Italics ours).

There was ample evidence that the failure of the coupler to operate was the proximate cause of decedent's death. It is only necessary to apply a little common sense to the physical facts to arrive at such conclusion and the Supreme Court of Oklahoma, therefore, erroneously held there was no evidence of proximate cause.

IV.

Under summary of the argument we showed that errors in the instructions were properly preserved for review by the Oklahoma Supreme Court and this Court. However, inasmuch as the Supreme Court of Oklahoma assumed

that such questions were sufficiently presented and proceeded to decide that the instructions were not prejudicially erroneous such questions were sufficiently raised, *N. C. R. Co.* v. *Zachary,* 231 U. S. 248, 257, 34 S. Ct. 305, 58 L. Ed. 591. *Miedreich* v. *Lauenstein,* 232 U. S. 236, 34 S. Ct. 309, 58 L. Ed. 584.

Instruction No. 8.

Instruction No. 8 (R. 188) informed the jury the law was directly contrary to what it is, *S. A. & A. P.* v. *Wagner,* 166 S. W. 24; Aff. 36 S. Ct. 626, 241 U. S. 476, 60 L. Ed. 1110. This was reversible error, *N. O. & N. E. R. Co.* v. *Scarlett, et al.,* 249 U. S. 528, 39 S. Ct. 369, 63 L. Ed. 752.

Instruction No. 9.

Instruction No. 9 (R. 188-189) required the jury to find that the coupler was defective "*prior to the time of the accident*". This was reversible error as the Safety Appliance Act has been violated if the coupler fails to work at any time and under any circumstances, *Delk* v. *St. L. & S. F. R. Co.,* 220 U. S. 580, 586, 31 S. Ct. 617, 55 L. Ed. 590, 595, and in the case of *C. B. & Q. R. Co.* v. *U. S.,* 220 U. S. 559, 574, 575, 31 S. Ct. 612, 55 L. Ed. 582, l. c. 588, quoting from the case of *St. Louis, etc., R. Co.* v. *Taylor,* 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061.

Instructions No. 12, 15, and 17.

Instructions No. 12 (R. 190), 15 (R. 191) and 17 (R. 192) informed the jury that it was the duty of decedent to "*exercise care to discover extraordinary dangers that might arise from the negligence of the employer or those for whose conduct the employer is responsible.*"

This is not the law and it was, therefore, reversible error to give such instructions, *C. & O.* v. *De Atley,* 241 U. S. 310,

36 S. Ct. 564, 60 L. ed. 1016. *C. R. I. & P.* v. *Ward,* 68 Okla. 201; Aff. 225 U. S. 18, 40 S. Ct. 275, 64 L. ed. 430.

Instruction No. 14.

Instruction No. 14 (R. 190-191) submitted the case and directed a verdict for respondents upon common law negligence, wholly ignoring the application of the Federal Employers' Liability and Safety Appliance Acts. This instruction is as follows:

> "You are further instructed that among the non-assignable duties of the defendants to the deceased was the duty *to use ordinary care to furnish him with a reasonably safe place to perform the duties of his employment, and reasonably safe means, instruments and appliances,* with which *to perform his duties, and to use ordinary care to maintain them in that condition so that as far as might be by proper care on his own part,* the employee would be enabled to perform his duties in safety to himself. If the defendants failed to properly discharge any of the duties to the deceased in so far as they are covered by the allegations of *negligence* in this case and by reason of such neglect or failure of the defendants, the deceased was killed, *while using ordinary care himself,* and in line of his duty and when he did not assume the risks, then the defendants would be liable and your verdict should be for the plaintiff. If the defendants performed their duty to the deceased, *as above indicated,* or if the deceased was himself wanting in ordinary care for his own safety *which was the sole cause of his death,* or if the deceased had assumed the risks, in either case, you should find for the defendants." (Italics ours).

The giving of this instruction was plain, fundamental and reversible error and precluded petitioner from recovering under the Acts aforesaid, Act of March 2, 1893, c. 196, Sec. 2, 27 Stat. 531 (Title 45, U.S.C.A. Sec. 2), Act of April 22,

1908, c. 149, Sections 1, 3 and 4, 35 Stat. 65 (45 U.S.C.A. Sections 51, 53 and 54). See Appendix A.

The test of a coupler is its operating efficiency and a failure to function at any time sustains a charge the statute was violated, no matter how slight the pull on the coupling lever, *A. C. Ry. Co.* v. *Parker,* 242 U. S. 56, 59, 37 S. Ct. l.c. 70, 61 L. ed. 150. *C. B. & Q.* v. *U. S.,* 220 U. S. 559, 575, 31 S. Ct. 612, 55 L. Ed. 582, 588. *C. R. I. & P.* v. *Brown,* 229 U. S. 317, 320, 33 S. Ct. 840, l.c. 841, 57 L. ed. 1204. *St. L. I. M. & S.* v. *Taylor,* 210 U. S. 281, 28 S. Ct. 616, 52 L. ed. 1061. *M-K-T R. Co.* v. *Herron,* 176 Okla. 162, l.c. 166.

Where a coupler fails to function such fact is sufficient evidence of its defective character regardless of how it functioned before or after such failure, *M. & St. L.* v. *Gotschall,* 130 Minn. 33, 153 N. W. 120, Aff. 244 U. S. 66, 67, 37 S. Ct. 598, 61 L. ed. 955. *Vigor* v. *C. & O.,* 101 F. (2d) 865, cert. den. 58 S. Ct. 1031. *M-K-T R. Co.* v. *Herron,* 176 Okla. 162, l.c. 166.

The Safety Appliance Act extends to every part of the couplers necessary for their operation, *M. St. P. & S. S. M. Ry. Co.* v. *Goneau,* 198 N. W. 403, 269 U. S. 406, 46 S. Ct. 129, 68 L. ed. 1089. *So. Pac.* v. *Thomas,* 188 Pac. 268, 269, 21 Ariz. 355; cert. den. 255 U. S. 576, 41 S. Ct. 447, 65 L. ed. 793.

The Safety Appliance Act extends its protection to employees other than those engaged in coupling or uncoupling operations, *L. & N.* v. *Layton,* 234 U. S. 617, 621, 37 S. Ct. 456, 61 L. ed. 931. *M. & St. L.* v. *Gotschall,* 130 Minn. 33, 153 N. W. 120; Aff. 244 U. S. 66, 67, 37 S. Ct. 598, 61 L. ed. 955. *C. & O.* v. *Vigor,* 101 F. (2d) 865; cert. den. 58 S. Ct. 1031.

When the violation of the Safety Appliance Act contributes to the injury or death of an employee, assumption of the risk is not a defense, Act of April 22, 1908, c. 149, Sec. 4, 35 Stat. 66, Sec. 54, Title 45, U.S.C.A. *Carter* v. *C. R. I. & P.,* 179 Okla. 292, l.c. 294.

Contributory negligence is not a defense under the Federal Employers' Liability Act, but merely diminishes the damages in proportion to the amount of negligence attributable to the employee unless the violation of the Safety Appliance Act contributes to the employee's injury or death, in which case no employee shall be held to have been guilty of contributory negligence, Act of April 22, 1908, c. 149, Sec. 3, 35 Stat. 66, Sec. 53, Title 45, U.S.C.A. *C. R. I. & P.* v. *King,* 165 Okla. 169, l.c. 177.

Even if the Safety Appliance Act is complied with, yet if the carrier operates the cars so that the appliances cannot be used without doing what the statute seeks to avoid, the statute is violated as fully as if the carrier had failed to install the appliances, *Johnson* v. *So. Pac.,* 196 U. S. 1, 25 S. Ct. 58, 49 L. ed. 363. *U. S.* v. *Ill. Cent. R. Co.,* 177 Fed. 801, 101 CCA 15. *Hohenleitner* v. *So. Pac.,* 177 Fed. 796. *Noel* v. *Q. O. & K. C. R. Co.,* 182 S. W. 787. *Christie* v. *Wabash,* 191 S. W. 241.

It will, therefore, be seen that where employment in interstate commerce and the violation of the Safety Appliance Act concur, contributory negligence is abolished for all purposes and assumption of the risk is no defense. *Grand Trunk Western R. Co.* v. *Lindsay,* 233 U. S. 42, 34 S. Ct. 581, 58 L. Ed. 835. *S. A. & A. P. R. Co.* v. *Wagner,* 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110. *T. & P.* v. *Rigsby,* 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874. *Carter* v. *Chicago, R. I. & P. R. Co.,* 179 Okla. 292.

It is difficult to imagine more error being crammed into a single instruction in a case of this character.

Instructions Nos. 11, 12, 13, 14, 15, 16, 18 and 21

Instructions 11 (R. 188-189), 12 (R. 190), 14 (R. 190-191), 15 (R. 191), 16 (R. 191-192) and 21 (R. 194), erroneously applied indiscriminately to both counts of the petition and,

therefore, constituted fundamental and reversible error, 64 Corpus Juris 601, 757. *Batson* v. *Alexander City Bank*, 60 So. 313, l.c. 316. *Ratti* v. *P. Berry & Sons, Inc., et al.*, 119 Atl. 894, l.c. 895. *Sunderland* v. *Fireproof Construction Co.*, 78 Ill. App. 102, l.c. 104. *Chicago & Alton R. Co.* v. *Eselin*, 86 Ill. App. 94. *Dudley* v. *Penn. R. Co.*, 153 Ill. App. 619, l.c. 624. *Mantonya* v. *Wilbur L. Co.*, 251 Ill. App. 364, l.c. 370.

The aforesaid instructions given by the court were so inapplicable, conflicting, contradictory and confusing that no one could understand their application.

To misdirect the jury as to the applicable law or as to upon whom the burden of proof rests is fundamental and reversible error, *New Orleans & N. E. R. Co.* v. *Harris*, 247 U. S. 367, 38 S. Ct. 535, 62 L. Ed. 1167. *Yazoo & M. V. R. Co.* v. *Mullins*, 249 U. S. 531, 39 S. Ct. 368, 63 L. Ed. 754. *New Orleans & N. E.* v. *Scarlett*, 249 U. S. 528, 39 S. Ct. 369, 63 L. Ed. 752. *Eagle-Picher* v. *Layton*, 182 Okla. 405.

There was no evidence in the record of either contributory negligence or assumed risk.

Conclusion.

In view of the decisions of this Court construing the Federal Employers' Liability and Safety Appliance Acts, the action of the Supreme Court of Oklahoma is not understandable and it is a travesty on justice for the Supreme Court of Oklahoma to deny petitioner a new trial and not permit her to submit her case to a jury under proper instructions. The Supreme Court of Oklahoma permitted a recovery in the case of *Ward* v. *C. R. I. & P.*, 68 Okla. 91, 173 Pac. 212; Aff. 252 U. S. 18, 40 S. Ct. 275, 64 L. Ed. 43, as shown aforesaid, and by its action has denied petitioner the right to recover under even more favorable circumstances. Certainly such inconsistencies in the law as are shown herein to exist between the present case and the cases

cited *supra* should be supervised and controlled by this Court. Petitioner should not be denied justice regardless of the substantial matters with which this Court has been occupied in the last few years. Petitioner is entitled to a construction of the laws which were enacted for the benefit of a great and underprivileged class and should not be deprived of the benefit of said laws because perchance the Supreme Court of the United States has no time to pass upon a just and meritorious case. Every Federal Employers' Liability case of which this Court has taken jurisdiction since the case of *Minn. S. P. & S. S. M. R. Co.* v. *Borum*, 286 U. S. 447, 52 S. Ct. 612, decided May 23, 1932, but one (*G. N. Ry. Co.* v. *Leonidas*, 303 U. S. 1, 59 S. Ct. 51) has been reversed. There has been only one case arising under the Federal Employers' Liability Act in which this Court has written an opinion in nearly four years.

The fact that all of the cases of which this Court has taken jurisdiction in nearly ten years have been reversed is some evidence of the need to exercise the supervisory power of this Court to the end that inferior courts will recognize and give effect to the beneficial provisions of the Act referred to and that justice be dispensed where justice is due and the benefits of the Act be not lost by such a distorted construction as is presented in the present case.

Respectfully submitted,

CLARENCE C. CHILCOTT,
Attorney for Petitioner.